No. 17-672

In The
Supreme Court of the United States

ALAN G. KEIRAN, *et ux.*,

Petitioners,

v.

HOME CAPITAL, INC., *et al.*,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Consistent with other Courts of Appeals, the Eighth Circuit applies the rule that a non-conclusory affidavit can create a question of fact precluding summary judgment but a conclusory affidavit cannot. Did the Eighth Circuit correctly apply that rule to the facts of this case when it held that Petitioners did not generate a question of fact as to whether they received the notices required by the Truth In Lending Act ("TILA") because their affidavits were conclusory?

2. Did the Eighth Circuit correctly hold that a borrower must have a valid right of rescission under TILA for a notice of rescission to be effective?

3. Did the Eighth Circuit correctly hold that Petitioners waived their arguments regarding computational errors in their disclosed finance charge, when Petitioners admit that they first raised the issue late in this litigation?

PARTIES TO THE PROCEEDING

Petitioners Alan G. and Mary J. Keiran were the plaintiffs in the district court and the appellants in the Eighth Circuit.

Respondents Bank of America, N.A. (successor by merger to BAC Home Loans Servicing, L.P.) and Bank of New York Mellon, as Trustee for the Holders of CWABS, Inc., Asset-Based Certificates, were defendants in the district court and appellees in the Eighth Circuit.

The complaint also named as defendants Home Capital, Inc. and John and Jane Does 1-10, but these parties were never served. *See* App.2a n.2.

CORPORATE DISCLOSURE STATEMENT

Bank of America Corp., a publicly traded company, is the ultimate parent corporation of Respondent Bank of America, N.A. To the best of Bank of America Corp.'s knowledge, no publicly held company owns 10% or more of its stock.

The Bank of New York Mellon Corp. is the parent corporation of Respondent Bank of New York Mellon. To the best of The Bank of New York Mellon Corp.'s knowledge, no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

STATUTES

RULES AND REGULATIONS

OTHER AUTHORITIES

BRIEF IN OPPOSITION

It is settled law among the lower courts, in TILA and non-TILA cases alike, that conclusory affidavits alone are insufficient to create a genuine issue of material fact. Here, the district court applied that settled rule and found the relevant parts of Petitioners' affidavits to be too conclusory to generate a question of fact, and so entered summary judgment for Respondents. Petitioners' core contention is that this was a mistake, and that the courts below should have assessed the affidavits differently. They claim that in affirming that decision the Eighth Circuit created a rule that affidavits from plaintiffs rarely create a fact question in TILA cases, but that is wrong. Consistent with other Courts of Appeals, the Eighth Circuit acknowledged in its opinion that even a self-serving affidavit can create a fact question if it is not conclusory. It just held that Petitioners' affidavits were too conclusory. Petitioners' argument that the Eighth Circuit incorrectly applied a settled rule to the facts of this case does not warrant this Court's attention.

Petitioners also seek to extend TILA rescission far beyond anything provided by the statute, contemplated by this Court or any Court of Appeals, or supported by common sense. They claim that even borrowers who have *no* right to rescind under TILA can escape the obligations of their mortgage loans if they send a TILA rescission notice and their lender does not sue them within 20 days. This proposal is patently countertextual and unworkable. The Eighth

Circuit disposed of it in one paragraph, and no other Court of Appeals has adopted it. It does not merit certiorari.

Finally, Petitioners ask this Court to correct an alleged arithmetic error that Petitioners never raised in the initial district-court proceedings or their first Eighth-Circuit appeal. As the Eighth Circuit held below, that issue is waived, and in any event the alleged "error" does not exist.

Petitioners concede that their allegations are about "hyper-technicality." Pet. 10. Indeed. The "wrongdoing" that Petitioners allege by their original lender (not Respondents here) is (1) giving Petitioners one paper copy of a disclosure form instead of two identical copies, and (2) asking Petitioners to pay a *smaller* finance charge than it disclosed. Based on those allegations, Petitioners have kept ownership of their house for the entire eight-year pendency of this dispute without making a single mortgage payment. The courts below rejected Petitioners' contentions on a narrow, fact-bound rationale. There is no need to extend these proceedings further. The Petition should be denied.

STATEMENT OF THE CASE

A. TILA Allows Rescission Of Mortgage Loans In Narrow Circumstances.

The federal Truth in Lending Act is meant to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. § 1601(a). For certain home mortgage loans, TILA gives the borrower "the right to rescind the transaction until midnight of the third business day following the consummation of the transaction." *Id.* § 1635(a). To allow consumers to exercise that right wisely, TILA requires a lender to make several "material disclosures" regarding the loan terms, including "the annual percentage rate, . . . the amount of the finance charge," and "the number and amount of payments." *Id.* § 1602(v). The disclosures must be made "clearly and conspicuously in writing, in a form that the consumer may keep." 12 C.F.R. § 226.17(a)(1). If the lender does not make the required disclosures, a borrower's rescission right lasts until "the third business day following . . . the delivery of the information," or until three years after closing, or until the property is sold, whichever is soonest. 15 U.S.C. § 1635(a), (f).

At issue in this case is the requirement that, for certain transactions, "the disclosures shall be made to each consumer who has the right to rescind." 12 C.F.R. § 226.17(d). Under the Act, a borrower's "written acknowledgment of receipt of any disclosures . . . does no more than create a rebuttable presumption of delivery thereof." 15 U.S.C. § 1635(c).

In 2015, this Court held that "a borrower need only provide written notice to a lender in order to exercise his right to rescind." *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S.Ct. 790, 793. A borrower who never receives proper TILA disclosures must "notif[y the lender] within three years after the transaction is consummated" – but even if the lender disputes the validity of the rescission and refuses to release its security interest, "[t]he statute does not also require [the borrower] to *sue* within three years" to enforce the rescission. *Id.* at 792 (emphasis added).

15 U.S.C. § 1635(b) prescribes how a rescission affects the lender's security interest:

> When an obligor exercises his right to rescind under subsection (a), . . . any security interest . . . becomes void upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor shall . . . take any action necessary or appropriate to reflect the termination of any security interest created under the transaction.

The implementing regulation is similar:

> (1) When a consumer rescinds a transaction, the security interest . . . becomes void. . . .
>
> (2) Within 20 calendar days after receipt of a notice of rescission, the creditor . . . shall take any action necessary to reflect the termination of the security interest.

12 C.F.R. § 226.23(d).

B. Petitioners Stop Making Their Mortgage Payments.

Petitioners Alan and Mary Keiran refinanced the mortgage on their house in December 2006, using a $404,000 loan from Home Capital, Inc. *See* App.2a.[1] The Keirans concede (Pet. at 11) that at the closing, Home Capital gave them their TILA disclosure form – indeed, the Keirans attached the disclosure form to their Complaint in this case. Moreover, "[i]t is undisputed that both of the Keirans signed an acknowledgment stating that they *each* received a complete copy of the disclosure statement that they were entitled to by the TILA." App.6a (emphasis added). The Keirans' mortgage note was eventually assigned to Respondent Bank of New York, with Respondent BAC Home Loans Servicing, LP servicing the loan. App.14a.

"The Keirans stopped making payments on the note in November 2008," less than two years after closing. App.2a. Nearly a year after that, "[o]n October 8, 2009, the Keirans sent [purported] rescission notices to the bank alleging that the Keirans did not receive sufficient copies of disclosures required by the TILA at the December 2006 closing." *Ibid.* As later became clear, the Keirans' claim is that Home Capital only gave them one paper copy of the disclosures when they allegedly should have received two identical copies. "BAC responded to the notice via letter" 19 days later,

[1] The Keirans do not substantiate their pervasive assertions that Home Capital acted unethically (*e.g.*, Pet. at 3) or that the loan's terms were "toxic" (Pet. at 4), and the lower courts did not assess those issues.

"on October 27, 2009." App.15a. BAC's letter to the Keirans "stated that the alleged violations were 'very vague' and that further clarification would be needed to address them." *Ibid.* The record does not indicate that the Keirans responded to this letter, but "[o]n January 7, 2010, the bank informed the Keirans that no basis for rescission existed." App.2a.

C. The Courts Below Entered Judgment For Respondents.

1. Initial Proceedings.

The Keirans filed this suit in the District of Minnesota in October 2010, "seeking rescission of the mortgage loan, money damages and a declaratory judgment voiding the bank's security interest." App.2a. The district court and Eighth Circuit initially held the Keirans' rescission claim to be time-barred. App.2a-3a. In a holding the Keirans do not challenge here, the district court also concluded that Respondents could not be liable for money damages because "there was no indication from the loan documents that any material defect was present." 2011 WL 6003961, at *3 (D. Minn. Nov. 30, 2011). "[T]he Keirans did not challenge that finding on appeal." App.10a.

The Keirans sought certiorari from this Court on the timeliness of their rescission claim. Following its *Jesinoski* decision, this Court granted their petition, vacated the judgment, and remanded for further proceedings. 135 S.Ct. 1152 (2015); *see* App.3a.

2. The Judgment Below.

On remand "both parties again moved for summary judgment," App.3a,[2] this time on the merits of the Keirans' rescission claim.[3] The courts below held for Respondents, rejecting each of the Keirans' arguments.

First, the Keirans submitted bare-bones affidavits "stat[ing] that they received only one copy" of the disclosure statement at closing rather than one for each of them, "that they were not provided with adequate time to review the documents that they signed, and that they have kept the documents secure and in their

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[2] The Keirans' accusation that documents "have been intentionally concealed from disclosure" (Pet. at 3 n.1) is false. In reality, Respondents produced the Keirans' entire loan file in discovery in 2011. The Keirans' Eighth Circuit brief made clear what the problem really was: they have cycled through several lawyers in this litigation, and some of those counsel apparently have not been aware of documents that were produced to their predecessors. CA8 Appellants' Br. at 10.

The same is true of the Keirans' allegation that Respondents "only partially disclos[ed] documents just prior to the summary judgment hearing." Pet. at 28 n.12. The Keirans raised this objection at the first summary judgment hearing in the district court, and the court granted them additional time to review recently-produced documents and advise the court if they wished to add to their summary-judgment papers. CA8 App.254-257. The Keirans' counsel later informed the court that "[a]fter further review, we do not have any additional arguments to present at this time." CA8 Appellees' Add.2.

[3] The Keirans incorrectly suggest that Respondents "sought judgment based on a statute of repose." Pet. at 21. The parties litigated timeliness in the previous round of appeals, but the opinions that the Keirans now ask this Court to review did not apply or consider any timeliness bar.

same condition since closing." App.19a.[4] The district court found the affidavits to be "conclusory" and incapable of generating a fact issue, and entered summary judgment for Respondents. App.21a; *see* App.20a. A unanimous Eighth Circuit panel affirmed, noting "black letter summary judgment law that a conclusory, self-serving affidavit will not defeat an otherwise meritorious summary judgment motion." App.9a. The Court of Appeals noted previous TILA cases in which it and the Third Circuit had held more detailed evidence of non-receipt of documents to create a fact question at the summary judgment stage. App.6a-9a (discussing *Bank of America, N.A. v. Peterson*, 746 F.3d 357 (8th Cir. 2014); *Stutzka v. McCarville*, 420 F.3d 757 (8th Cir. 2005); and *Cappuccio v. Prime Capital Funding LLC*, 649 F.3d 180 (3d Cir. 2011)). But it held that, unlike in those cases, the Keirans' affidavits did not rise above the conclusory level. App.9a.

Second, the Keirans argued for the first time "that they are entitled to rescission because certain finance charges included in the disclosure statements were materially inaccurate." App.10a (emphasis omitted). They had not, however, "raise[d] any specific objections to the accuracy of the disclosure statement during the first summary judgment proceedings before the

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[4] The Keirans are mistaken in arguing (Pet. at 9 n.7) that Respondents "judicially admitted" that the Keirans received only one copy of the disclosures. As the Eighth Circuit noted in rejecting that argument, "in earlier stages of this litigation, the bank argued that *even if* the Keirans had received only one copy, this would have been legally sufficient." App.9a n.5 (emphasis added). That of course is not an admission of anything.

district court," or in their first appeal to the Eighth Circuit. *Ibid.* The Eighth Circuit therefore held "that the Keirans' allegations are waived." *Ibid.*[5] Alternatively, the Court of Appeals briefly discussed and rejected the Keirans' claim on the merits, noting that TILA and its regulations prohibit only finance charges that are higher than the disclosed amount, while the Keirans argued mostly that their finance charge was *lower* than disclosed. App.11a.[6]

Third and finally, "[t]he Keirans argue[d] that because the bank did not adequately respond to their notice within twenty days, the rescission took effect twenty days from bank's receipt of the notice," even if the Keirans had no TILA rescission right. App.12a. The Eighth Circuit rejected that argument, holding that "[t]he efficacy of this claim completely depends on whether there was a TILA disclosure violation." *Ibid.* Since there was no such violation, the court held that "the Keirans had no more than the three day window to rescind and the window closed in early 2007," immediately after the closing. *Ibid.*

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[5] The Court of Appeals did not reach that conclusion "sua sponte," as the Keirans state (Pet. at 5). Respondents spent two full pages of their Eighth Circuit brief arguing that this issue had been waived. CA8 Appellees' Br. at 21-23.

[6] Specifically, the Keirans alleged that "a hazard insurance premium charge listed as $1,955" on the disclosure "should have been for only $1,205." App.11a. As the Eighth Circuit noted, 12 C.F.R. § 1026.23(g)(1)(ii) permits an overstatement of the finance charge. App.11a.

REASONS FOR DENYING THE WRIT

Petitioners first argue that the courts below mistakenly found their affidavits to be conclusory. That is simply a request that this Court correct an alleged error in a fact-bound application of settled law.

Petitioners secondly insist that a TILA rescission notice is automatically effective – even for a borrower with no TILA rescission right – if the lender does not sue within 20 days of receipt. That unworkable proposal contradicts the plain statutory text, is not grounded in any decision of this Court, and has not been taken seriously by any Court of Appeals.

Petitioners' final contention is that their lender disclosed too much of a finance charge. Petitioners waived this issue, and in any event they identify no error in the lower courts' holdings.

The writ should be denied.

I. The Circuits Uniformly Require More Than Conclusory TILA Affidavits.

The Eighth Circuit in this case applied the same "black-letter" rule of "summary judgment law" that any Court of Appeals would: if an affidavit is "conclusory," it "will not defeat an otherwise meritorious summary judgment motion." App.9a. Indeed, "ultimate or conclusory facts . . . cannot be utilized on a summary-judgment motion." Wright & Miller, *Federal Practice & Procedure* § 2738 (4th ed.). That is logical. Since "mere conclusory statements" in a complaint do not count even for purposes of a motion to dismiss, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), it would make little sense if similar language in an affidavit could somehow create an issue for trial. The Keirans do not dispute that rule or claim that there is any disagreement in the Courts of Appeals about it.

Instead, the Keirans' real argument is that the courts below misapplied this settled rule to these particular facts. That does not warrant certiorari. In the circumstances of this case, the courts below held that the Keirans' "conclusory denial of receipt of the TILA disclosures" could not create a genuine issue of fact about the number of disclosure sheets they received. App.8a. The Keirans point to other cases (including from the Eighth Circuit) where TILA plaintiffs defeated summary judgment with non-conclusory affidavits attesting to non-receipt of disclosures, and they argue that their affidavits were like those ones. Pet. at 12-13. But their attempt to dress this up as a "circuit split" fails badly. As the Eighth Circuit recognized below, the record in this case is different. App.6a-9a (discussing *Peterson*, 746 F.3d 357, and *Stutzka*, 420 F.3d 757). The panel below noted the "remarkable" and "extraordinary" facts of those cases, App.8a, 9a,[7] but

[7] Those cases did present rather extreme facts. In *Peterson* the defendant lender admitted in writing to multiple irregularities in the closing – and then tried to send new paperwork to the borrowers that did not even correct all of the admitted irregularities. 746 F.3d at 358-359; *see* App.8a ("bank demonstrated its lack of TILA diligence on more than one occasion and memorialized those lapses in letters to the debtor"). In *Stutzka* the borrower was a blind and developmentally-disabled widow whose guardian and

contrary to the Keirans' suggestion (Pet. at 14-15), it did not hold that such facts are *required* for a TILA plaintiff to ward off summary judgment. On that point the Eighth Circuit applied the settled rule: an affidavit claiming that a plaintiff did not receive documents must be more than conclusory. App.9a.

The Keirans are wrong to suggest (Pet. at 1, 6, 12-15) that there is any disagreement among the Courts of Appeals on this point. Indeed, in one of the primary cases they rely on, *Cappuccio v. Prime Capital Funding LLC*, the Third Circuit expressly applied the same rule as the Eighth Circuit here. There the Third Circuit rejected a blanket rule that, when a TILA plaintiff has signed a receipt for the proper disclosures, "something more than just the testimony of the borrower is needed to rebut the presumption that she received" those disclosures. 649 F.3d 180, 189 (3d Cir. 2011). The court observed "that a single, *non-conclusory* affidavit . . . is sufficient to defeat summary judgment." *Ibid.* (emphasis added). The Eighth Circuit applied that very same rule in *Peterson* and found, consistent with the Third Circuit, that a non-conclusory affidavit of non-receipt was sufficient to create a fact issue. 746 F.3d at 361 (citing *Cappuccio*, 649 F.3d at 189-190). In this case, it again consistently applied the converse of that same rule and found that an affidavit that *is* conclusory does *not* defeat summary judgment. *See* App.8a ("[A] borrower's own conclusory denial of receipt of the TILA disclosures, unaccompanied by details or other

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conservator confirmed that she had no papers when she returned home from the loan closing. 420 F.3d at 758, 762-763.

evidence supporting the denial . . . is insufficient to rebut the presumption of delivery created by § 1635(c).”). There is no divide among the circuits on the rule concerning conclusory affidavits.

The Keirans do no better by pointing to *Marr v. Bank of America*, 662 F.3d 963 (7th Cir. 2011). There the Seventh Circuit found that a TILA plaintiff's affidavit of non-receipt was enough to preclude summary judgment, but it did not consider what the effect of a conclusory affidavit would have been. More generally, the Seventh Circuit follows the rule that “conclusory allegations by the party opposing a summary judgment motion cannot defeat the motion,” *Aberman v. J. Abouchar & Sons, Inc.*, 160 F.3d 1148, 1150 (7th Cir. 1998) (brackets and citation omitted), and the *Marr* panel did not suggest it was carving out an exception to that rule. That, of course, is the same rule that the Eighth Circuit applied here.

Ultimately, the Keirans simply disagree with the Eighth Circuit about whether their affidavits were conclusory. The Keirans insist that they submitted “detailed” affidavits. Pet. at 11-12, 16. But the courts below found their statements to be the kind of “conclusory denial of receipt of the TILA disclosures, unaccompanied by details,” that cannot get past summary judgment. App.8a. Viewed in this light, the Keirans' petition is merely a request that this Court correct that alleged fact-bound error. That does not warrant certiorari.

II. TILA Rescission Notices Are Only Effective If TILA Actually Gives The Borrower The Right To Rescind.

As the Keirans recognize, the Eighth Circuit held that they had not "sufficiently demonstrated a TILA violation, [so] there was no TILA rescission possible" beyond the initial three-day period after closing. Pet. at 5. The Keirans argue that this "contravenes this Court's *Jesinoski* decision." *Ibid.* They claim that under *Jesinoski*, every purported TILA rescission notice – valid or not – requires the lender to file suit within 20 days, or else automatically voids the lender's security interest. Pet. at 17 & n.11, 24-25.

The Keirans are badly mistaken. Their position flatly contradicts TILA's plain text, this Court's *Jesinoski* decision, and common sense. No Court of Appeals has adopted it.

A. Enforcing Invalid Rescission Notices Would Contravene TILA's Plain Text and *Jesinoski*.

TILA, as codified at 15 U.S.C. § 1635(a), states that a mortgage borrower "shall have the right to rescind the transaction until midnight of the third business day following . . . the delivery of the information and rescission forms" that the statute requires. A borrower may exercise his rescission right "by notifying the creditor . . . of his intention to do so." *Ibid.* Subsection (b) of § 1635 specifies how rescission works: "*[w]hen an obligor exercises his right to rescind under subsection (a)*

. . . , any security interest given by the obligor . . . becomes void upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor . . . shall take any action necessary or appropriate to reflect the termination of any security interest. . . ." (emphasis added).

Thus, the statute is unambiguous: A lender's security interest is voided only if a borrower "exercises his right to rescind under subsection (a)." When a lender makes the proper disclosures, then after three days the borrower has *no* right to rescind under subsection (a). The result is the one this Court recognized in *Jesinoski*: after three days pass from a loan closing, borrowers "may rescind only if the lender failed to satisfy the Act's disclosure requirements." 135 S.Ct. at 792. If the lender does not make the proper disclosures, then a notice of rescission will be effective if sent within three years. But if the lender did make the disclosures, then after the three-day period passes, any attempted notice of rescission the borrower sends will have no effect.

The Keirans' proposal would completely invert this statutory order. They argue that subsection (b) requires a lender to release its security interest "[w]ithin 20 days of receipt of [*even an invalid*] notice of rescission." Taken at face value, that would wipe out all the time limits (and other limits) that TILA places on the rescission right. The Keirans recognize that is not tenable, so they are forced to invent a different limitation: they propose that the lender must release the security interest *or sue the borrower* within 20 days. But TILA does not even hint that. If receiving a purported notice of rescission automatically triggered a lender's obligation to unwind the mortgage, then normally the lender would need a preliminary injunction or other temporary relief to excuse it from doing so. Nothing in the statute suggests that simply filing suit would provide a sort of automatic TRO, as the Keirans apparently contend.

Nor did *Jesinoski* suggest what the Keirans propose. The Keirans seize on this Court's statement that a TILA "rescission is effected when the borrower notifies the creditor of his intention to rescind." 135 S.Ct. at 792. But that quote addresses the timing of the rescission, not the existence of the right itself. This Court did not hold in *Jesinoski* that a borrower can undo a mortgage by sending a frivolous notice of rescission. Instead, *Jesinoski* holds that a TILA rescission notice is immediately effective, but only if the borrower actually *had* a TILA right to rescind. *Id.* at 792 (sending a rescission notice is "all that a borrower must do in order to exercise his right to rescind under the Act"). Thus, the Keirans also get no help from *Jesinoski*'s observation that "[§] 1635(a) nowhere suggests a distinction between disputed and undisputed rescissions." 135 S.Ct. at 792. The relevant distinction here is not between disputed and undisputed rescissions; it is between *valid* and *invalid* rescission attempts – which *Jesinoski* certainly did not equate.

B. The Keirans' Proposal is Not Workable.

The Keirans' proposal also would have the untoward practical consequence of flooding the courts with meaningless TILA suits. It would create a sort of mortgage-rescission lottery: down-on-their-luck borrowers could send baseless notices of rescission, hoping that their bank would neglect to sue them within 20 days. Lenders who received such notices would have little time to evaluate and resolve invalid requests, but instead would have to reflexively file suit every time. Widespread waste of effort would result.

The Keirans wrongly insist that their rewriting of the statute is nevertheless necessary to prevent lenders from "ignor[ing] cancellation notices with impunity because there would be no liability for lenders who violate the TILA." Pet. at 23. In reality, TILA provides a much more sensible enforcement mechanism. If a borrower validly rescinds a mortgage loan and the lender fails to cooperate in unwinding the transaction as required by TILA, the borrower may sue under 15 U.S.C. § 1640(a) for "any actual damage sustained," plus a penalty of "twice the amount of any finance charge in connection with the transaction," plus "the costs of the action, together with a reasonable attorney's fee." The courts expressly recognize that this "creates incentives for creditors to rescind mortgages when faced with valid requests." *Belini v. Washington Mut. Bank, FA*, 412 F.3d 17, 25 (1st Cir. 2005) (collecting cases applying § 1640 remedies when lenders failed to unwind rescinded mortgages).

In short: if a borrower asserts a valid right to rescind, then a proper notice of rescission is effective, and the lender must unwind the transaction or face liability for damages, statutory penalties, and attorneys' fees (as well as injunctive or declaratory relief recognizing the rescission). On the other hand, if a borrower asserts an invalid claim (as the Keirans were found to have done here), then a notice of rescission is ineffective and the lender need not do anything. So borrowers who sue seeking a confirmation of their TILA rescission must show that they actually had a right to it, not merely that the defendant failed to act. The Keirans' arguments to the contrary are meritless.

The Keirans nevertheless argued below "that the bank's security interest is void because the bank failed to adequately and timely respond to their notice of rescission." App.11a-12a. The Eighth Circuit disposed of this argument in one summary paragraph. *Ibid*. In light of the foregoing, its resolution was exactly right: "The efficacy of this claim completely depends on whether there was a TILA disclosure violation. As discussed above, there was not. . . . [T]his claim is without merit." App.12a.

C. No Court of Appeals has Entertained the Keirans' Proposal.

Unsurprisingly, the Keirans cannot point to any Court of Appeals that has adopted, or even seriously considered, their countertextual interpretation of TILA. They do not even try. Indeed, even the district-court opinions the Keirans cite did not hold that borrowers without TILA rescission rights may still rescind. In one of those cases the lender did not contest the borrower's rescission right;[8] in another, the court stated the Keirans' rule in dicta at the motion-to-dismiss stage but decided differently at summary judgment;[9] and the third cited those same dicta in dicta of its own before dismissing the TILA claims on other grounds.[10]

In the absence of significant acceptance or even discussion of the Keirans' extraordinary proposal in the Courts of Appeals, there is no reason for this Court to consider it.

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[8] *Aquino v. Public Fin. Cons. Discount Co.*, 606 F. Supp. 504, 507 (E.D. Pa. 1985).

[9] *Compare Paatalo v. JPMorgan Chase Bank*, 146 F. Supp. 3d 1239, 1243-45 (D. Or. 2015) (applying *Jesinoski* to claims based on an allegedly timely rescission notice; commenting in dicta that the lender could either have unwound the loan or filed suit itself), *with id.*, 2016 WL 4708539, at *4 (D. Or. Sept. 7, 2016) ("To prevail on his claims, plaintiff must show that he had a conditional right to rescind the loan and that he exercised that right within the relevant timeframe.").

[10] *Johnson El v. JPMorgan Chase Bank N.A.*, 2016 U.S. Dist. LEXIS 132051 at **8-17 (E.D. Mich. Sept. 27, 2016) (incorrectly cited at Pet. 25 as 2016 U.S. Dist. LEXIS 133466).

III. The Keirans Forfeited Their Meritless Arguments that the Lower Courts Made a Calculation Mistake About Their Finance Charge Disclosure.

The Kierans' final question presented is mostly unintelligible. They allege that something was wrong – it is not clear what – both with Home Capital's disclosure of "finance charges" on their mortgage, and with how the lower courts discussed the matter. *See* Pet. at 27-33. But the Keirans have forfeited this issue, which in any event does not even present a colorable claim of error, let alone a question remotely worthy of certiorari.

The Keirans have forfeited all claims related to the amount of their disclosed finance charge. As the Eighth Circuit noted, "[t]he Keirans did not raise any specific objections to the accuracy of the disclosure statement during the first summary judgment proceedings before the district court or [the first Eighth-Circuit appeal]," App.10a (emphasis omitted), nor did they seek to present the issue in this Court on their previous visit. Moreover, "[w]hen the district court noted that the statements were accurate in the first round of proceedings, the Keirans did not challenge that finding on appeal" or in this Court. *Ibid.* The Keirans do not dispute any of this. They simply maintain that, because they have always been asserting "the *validity* of [their] rescission notice," they can continue formulating brand-new factual theories why Home Capital violated TILA at any stage of this litigation. Pet. at 28-29 n.13. The Keirans make no plausible argument that this is the law.

Even on the merits, the Keirans do not coherently articulate an argument for error below, let alone an issue worthy of certiorari. The Keirans' factual contention is that the "$1,955 hazard insurance premium" that Home Capital disclosed as part of their finance "charge should have been only $1,205,"[11] and that "[t]his, and other inaccurate fees totaled $2,172.40." Pet. at 30.[12] This argument – that Home Capital

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[11] As best as Respondents can tell, the Keirans are complaining that the disclosure should not have included certain past-due insurance payments that they were required to bring current as part of the refinancing transaction. The Keirans have never disputed that they were indeed required to make those payments, nor explained why they think the payments should have been excluded from the finance charge.

[12] The Keirans list their alleged "other inaccurate fees" in a footnote, with little or no explanation for most of them. *Id.* n.14. The largest item is a $1155.40 portion of their final payments on their *previous* mortgages – before the Home Capital loan. The Keirans claim this was unearned interest, apparently because it was for a period after the Home Capital loan replaced their old one. The Keirans apparently claim that their previous lender failed to rebate this money to them, so Home Capital should have disclosed it as part of the new finance charge. But there is a very basic problem: Home Capital did not assess this charge and never received a penny of it. The Keirans' previous lender did. Regulation Z § 226.20(a), which the Keirans try to invoke, is inapposite because it "applies only to refinancings undertaken by the original creditor or a holder or servicer of the original obligation. A 'refinancing' by any other person is a new transaction under the regulation, not a refinancing under this section." 12 C.F.R. Pt. 226, Supp. I, Subpt. C, § 226.20(a)(5). Home Capital was not the original creditor here, so the Keirans' argument is meritless. Not surprisingly, both cases that they cite on this point involved an original creditor refinancing its own prior loan to a borrower. *Steele v. Ford Motor Credit Co.*, 783 F.2d 1016, 1017 (11th Cir. 1986); *In re Steinbrecher*, 110 B.R. 155, 158, 165 (Bankr. E.D. Pa. 1990).

disclosed *too high* an insurance premium – runs afoul of 12 C.F.R. § 1026.23(g)(1)(i), which provides that "[t]he finance charge . . . shall be considered accurate . . . if [it] . . . is greater than the amount required to be disclosed." The Eighth Circuit noted this in briefly rejecting the Keirans' argument, App.11a, and the Keirans offer no intelligible criticism of that holding. *See* Pet. 31.[13]

If that were not more than enough, the Keirans do not contest the Eighth Circuit's determination that TILA gave Home Capital a margin of error even to *under*state the disclosed finance charge by up to $2020. App.11a; Pet. at 29-30 (discussing 15 U.S.C. § 1605(f)(2)(A)). Even the Keirans' alleged $750 insurance-premium-disclosure error was only a portion of that amount. So even if they had somehow articulated a hazard-insurance-premium-disclosure issue for this Court's review, the Keirans' case would not present that issue unless they could coherently argue that the disclosure was off by *another* $1270. They have not done so.

[13] The Eighth Circuit also noted that TILA does not require hazard-insurance premiums to be disclosed as part of the finance charge at all, as long as borrowers are properly advised (as the Keirans were) that they can shop around for such insurance. App.11a (discussing 15 U.S.C. § 1605(c)). The Keirans offer no coherent criticism of that ruling either. *See* Pet. at 30-31.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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